party from another, either at common law or in equity or under a statute' (such as the UK Law Reform (Frustrated Contracts) Act 1943 in that case: see *BP Exploration Co (Libya) Ltd* v *Hunt (No 2)*[14]). As s 11 of our Civil Law Act 1956 is in pari materia with the said s 3(1) of the UK Law Reform (Miscellaneous Provisions) Act 1934, the words 'any debt or damages' in s 11 of our Civil Law Act 1956 should also be construed to cover any sum of money which is recoverable by one party from another.

But in the present case the payment of interest was not within the contemplation of the parties as such payment of interest has not been provided for in the agreements to meet the situation created by the plaintiffs' breach of contract. Moreover, there was no evidence adduced that the plaintiffs had actually incurred charges in obtaining finance from another source to pay for the shares which they had contracted to purchase from the defendant. Having considered the contention of both counsel, I decided in the exercise of the court's discretion under s 11 of the Civil Law Act 1956, that in all the circumstances this was not a fit and proper case for the award of interest from 27 January 1986, ie the date when the plaintiffs themselves committed a breach of the agreements by failing to pay the balance of the purchase price to the defendant. Interest was, however, awarded at the rate of 8% pa to be paid from the date of judgment, ie 23 December 1988, until the date of payment. As the plaintiffs were only successful in recovering about 70% of their claim, I therefore in the exercise of the court's discretion awarded them 70% of the taxed costs of the action.

Order accordingly.

Solicitors: *Sri Ram, Zulkifly & Kumar*; *Wang Kuo Shing & Co.*

Reported by *Ng Sheau Jiuan*

Mensa Mercantile (Far East) Pte Ltd v Eikobina (M) Sdn Bhd

HIGH COURT (KUALA LUMPUR) – SUIT NO D3-22-254-1987
SITI NORMA YAAKOB J
2 FEBRUARY 1989

Contract – Time for performance – No specific time mentioned – Whether time was of the essence of the contract – Whether reasonable time given for performance of obligation – Breach of contract – Remedy – Sale of goods – Whether specific performance the proper remedy – Whether damages an adequate remedy – Sale of Goods (Malay States) Ordinance 1957, s 58

Sale of goods – Breach of contract for sale of goods – Remedy – Whether specific performance the proper remedy – Whether damages an adequate remedy – Sale of Goods (Malay States) Ordinance 1957, s 58

Words and Phrases – 'As is where is'

By a memorandum dated 6 May 1987 executed by the parties to the suit, the defendant agreed to sell to the plaintiff certain used heavy construction machines for the sum of 92.5 million yen. It was also agreed that the defendant will accord the plaintiff the full exclusive right to act as the defendant's sales agent for the remaining machinery at the defendant's yard.

The memorandum was silent as to when the plaintiff was to make payment of the purchase price and as to when the defendant was to deliver the machines. However, the memorandum made reference to a formal sale and purchase agreement to be entered into with the mutual consent and understanding of both parties at the soonest possible time. No such agreement was executed between the parties and the plaintiff then filed the instant suit seeking, inter alia, an order for specific performance of the memorandum on the ground that the defendant had breached its obligations under the memorandum in failing to accept the purchase price when it was tendered.

In its defence, the defendant pleaded that it had made time the essence of the contract when it gave notice to the plaintiff that it was willing to accept payment and to deliver the machines to the plaintiff on or before 22 July 1987 and that when no such payment was made by that date the plaintiff was therefore in breach of the contract. The plaintiff denied that the date of completion was 22 July 1987 because as at that date both parties had yet to agree on specific issues in the agreement to be executed and that payment was only due five days later on 27 July 1987 but when tendered it was refused by the defendant in breach of its obligations under the memorandum.

The defendant had written a letter dated 7 July 1987 to the plaintiff fixing 22 July 1987 as the date of payment. It was contended for the defendant that by writing that letter the defendant had every intention to make time the essence of the contract as the plaintiff had been making unreasonable demands, thereby delaying the completion of the agreement. It was also submitted for the defendant that the 14-day period for payment stipulated in the letter was a reasonable period.

The plaintiff had written through its solicitors to the defendant on 18 July 1987 stating that it agreed to abide by the terms of the memorandum but since the date of payment, namely, 22 July 1987, set by the defendant had been given at too short notice, the plaintiff requested that it be given a week's notice to make payment and undertook to make payment by 27 July 1987. As this was a variation to the date fixed by the

defendant, the plaintiff stated in the letter that if the plaintiff failed to hear anything to the contrary, it will assume that the defendant agreed to the new date of payment.

In a letter dated 21 July 1987 to the plaintiff, the defendant indicated that it was not agreeable to extending the date of payment to 27 July 1987. The plaintiff then wrote a letter to the defendant dated 22 July 1987 stating that it was reasonable to allow a grace period of seven to ten days within which to make payment of such large sum as the purchase price and again confirmed that it will make payment on 27 July 1987. The defendant wrote a letter in reply saying that as the plaintiff had failed to pay the purchase price on 22 July 1987, the defendant treated the non-payment as a wrongful repudiation of the memorandum but that it accepted the repudiation and would hold the plaintiff liable for damages. The plaintiff wrote through its solicitors in reply stating, inter alia, that payment would be effected at 12 noon on 27 July 1987. The defendant however, refused to accept the money when it was tendered on the appointed date.

At the trial, the defendant contended that the plaintiff did not have the necessary funds to make payment of the purchase price on 22 July 1989. For the plaintiff, evidence was adduced to show that having decided to buy the machines it had advertised to sell the same machines to third parties and had incurred obligations to such parties.

Held:

(1) From the memorandum, it was clear that time was not originally of the essence of the contract between the parties and that the only reference as to time concerned the formal sale and purchase agreement to be entered into between them and even then no specific time was mentioned other than that it should be at the soonest possible time. Under such circumstances, time can only be made the essence of a contract by one party giving notice to the other subject to two requirements: (a) that the other party has been guilty of unreasonable delay; and (b) the time mentioned in the notice must be reasonable.

(2) It was not disputed that the 14-day period stipulated by the defendant was a reasonable period. However, since the essence of any agreement lies in the parties reaching accord on material terms in such agreement and since in this case there was no such common consensus reached between the parties when the defendant fixed 22 July 1987 as the completion date, time did not become the essence of the contract as, at the time the date of completion was fixed by the defendant, there were still unresolved issues pending between the parties.

(3) However, when on 18 June 1987, the plaintiff through its solicitors wrote to say that the plaintiff was prepared to make payment on 27 July 1987, the plaintiff was doing nothing more than to comply with the mutual understanding expressed in the memorandum that agreement should be reached 'at the soonest possible time' which in the context of this case meant within a reasonable time after 18 July 1987 when all disputes between the parties had been resolved by the plaintiff in deciding to compromise with the defendant. Therefore 27 July 1987 was the more acceptable date of completion as at that date whatever issues that were pending between the parties no longer existed. Consequently, when the plaintiff tendered payment of the price to the defendant on 27 July 1987 and it was not accepted by the defendant, the defendant was in clear breach of the memorandum.

(4) The defendant's contention that the plaintiff did not have the necessary funds to make payment of the purchase price on 22 July 1987 merited no consideration whatsoever. The defendant was not entitled to question where the plaintiff could turn to to make payment. All that was relevant was whether at the time payment was due the plaintiff could produce the money and there was evidence that the plaintiff was able to make payment on 27 July 1987, which was the date for payment.

(5) In deciding whether or not to make an order for specific performance in addition to determining the type of goods in question, the court is entitled to look at all the surrounding circumstances of the case including the conduct of both the buyer and the seller and to consider the hardship which an order for specific performance would inflict on the seller.

(6) The plaintiff's obligations to third parties cannot form the basis of a decree of specific performance especially so in this case when such obligations were incurred before the subject matter of such sales had come into the plaintiff's possession.

(7) If anything at all the plaintiff must show that the machines were not easily available in the market and as such they were of a unique interest and value to it. Since such goods can be located in the market, either singly or in bulk, the test of their unique value had not been discharged by the plaintiff and on this ground alone damages was an equally adequate remedy.

[*Editorial Note*: The plaintiff and the defendant have both appealed to the Supreme Court vide Civil Appeal Nos 02-47-1989 and 02-49-1989 respectively.]

Cases referred to

1 *Ganam d/o Rajamany* v *Somoo s/o Sinniah* [1984] 2 MLJ 290 (folld)
2 *Behnke* v *Bede Shipping Co Ltd* [1927] 1 KB 649 (refd)

Legislation referred to

Sale of Goods (Malay States) Ordinance 1957 ss 2, 58
Specific Relief Act 1950 Ch II
Sale of Goods Act 1979 [UK] s 52

David Morais for the plaintiff.
R Rajeswaran (*M Nagarajah* with him) for the defendant.

Cur Adv Vult

Siti Norma Yaakob J: The cause of action in this suit is founded on a memorandum, AB15-16, concluded between the parties to this suit on 6 May 1987 and for which they had mutually agreed as carrying the bond of an agreement between them.

Under the memorandum, the defendant agreed to sell 24 listed items of used heavy construction machines to the plaintiff for the sum of 92.5 million yen and that the sale of such machines was on an 'as is where is' basis. Another important area agreed upon in the memorandum is that the plaintiff will pay for all repair or reconditioning works done on the machines for which such works had already been commenced at the time the memorandum was executed. Lastly, it was also agreed that the defendant will accord the plaintiff the full exclusive right to act as sales agent for the remaining lot of machinery left at the defendant's yard in Kapar, Port Klang, such machinery being those listed in AB17-18.

The memorandum was prepared on the defendant's letterhead and signed by the president and the chief executive officer of the plaintiff company, PW1, and the chairman of the defendant company, DW1, who had specially arrived from Japan to finalize the memorandum.

The memorandum, however, is silent as to when the plaintiff should make payment of the purchase price or when the defendant should deliver the machines upon purchase, but these omissions are understandable as the memorandum makes reference to a formal sale and purchase agreement to be entered with the mutual consent and understanding of both parties at the soonest possible time and no doubt the completion date of the agreement would be apparent in the sale and purchase agreement to be agreed and executed upon.

However, no such agreement was executed between the parties and the plaintiff filed this instant suit seeking, inter alia, specific performance of the memorandum, on the ground that the defendant had breached its obligations under the memorandum for failing to accept the purchase price when tendered. In its defence, the defendant has pleaded that it had made time the essence of the agreement when it gave notice to the plaintiff that it was willing to accept payment and deliver the machines to the plaintiff on or before 22 July 1987. When no such payment was made by that date, the plaintiff had therefore been in breach.

The plaintiff on the other hand denies the date of completion to be 22 July 1987 as at that date, both parties had yet to agree on specific issues in the agreement to be executed and that payment was only due five days later on 27 July 1987, but when tendered it was refused by the defendant. It is therefore the plaintiff's contention that the defendant had breached its obligations under the memorandum and the principal issue for determination is when was the date of completion.

To appreciate the many issues raised in this action, it is necessary that I trace the events following the execution of AB15-16.

A draft sale and purchase agreement, AB19-21 dated 19 May 1987 was prepared and submitted to the defendant, by PW1, on behalf of the plaintiff on the letterhead of a company called Fuji Sangyo Pte Ltd (hereinafter to be referred as 'Fuji Sangyo'), based in Singapore.

AB19-21 was received by the managing director of the defendant company, DW2, who by then had asssumed the responsibility of completing the agreement on behalf of the defendant company as DW1 had returned to Japan. DW2, however, was not happy with the terms of the draft agreement for the following reasons:

(1) at AB19, under the heading 'valuation' PW1 had divided the machines to be purchased into two lots. DW2 maintains that all the machines should be sold as one lot,

(2) also at AB19, under the heading 'Specifications', condition (2) appears to contradict condition (1), which confirms that the machines are to be sold on an 'as is where is' basis.

(3) at AB20, under the heading 'Payment', PW1 had suggested that payment of the purchase price be made within one month of the signing of the sale and purchase agreement, by the deposit of 7.250 million yen within two weeks of the execution of the agreement and the balance two weeks later. DW2 maintains that payment of the purchase price should be in one lump sum payment.

(4) at AB20A, under the heading 'Separate Account', PW1 had not inserted the costs of repairs of the three machines which DW2 maintains had already been agreed between PW1 and DW1 at $147,000.

On the instructions of DW1, DW2 was told not to agree to AB19-21 and on being informed of this, PW1 met DW2 on 2 June 1987 when they discussed the proposed terms of the agreement further. The meeting was also accompanied by a visit to the defendant's yard at Kapar, Port Klang, where PW1 inspected the machines. It must also be noted that this was not the first time he had seen the machines, as he had made three similar visits to the defendant's yard, prior to the execution of the memorandum.

Following this meeting and inspection, another sale and purchase agreement was drafted, also on Fuji Sangyo's letterhead, this time by DW2, dated 3 June 1987, AB29-31, containing terms which DW2 maintains had been agreed upon by PW1, the previous day.

Comparing AB29 to AB19, it is clear that under the headings of 'Evaluation' and 'Specifications', the 24 items of machines are stated to be purchased as one lot and that condition (2) has been rephrased to coincide with condition (1) that the machines be purchased on an 'as is where is' basis.

At AB30, under the heading 'Payment', the purchase price is to be settled by one lump sum payment on 5 June 1987, payment to be made in Japan in cash, and in default, the agreement shall be cancelled. Evidence was also led to show that PW1 had agreed to go to Japan with DW2 where the sale and purchase agreement would be executed with DW1 and payment accordingly made.

At AB31, under the heading 'Separate Account', the figure of $147,000 has been inserted as being the agreed repair costs of the three machines.

PW1's reaction to AB29-32, upon receipt of it on the evening of 3 June 1987, was to immediately telephone DW2 in Kuala Lumpur informing him of his unwillingness to travel to Japan on 4 June 1987, together with cash

of 92.5 million yen and make payment at DW1's residence on 5 June 1987. Apart from the time grace within which to convert the purchase price into Japanese currency, PW1 had also considered the danger of having that large amount of cash on his person.

DW2 relayed the gist of his telephone conversation to DW1 in Japan and he, DW2, was instructed by DW1 to cancel the agreement since PW1 was delaying payment.

On 5 June 1987, PW1 sent AB33 to DW2, wherein he confirmed his objections to AB29-31, and a summary of his objections appears at AB34-35 which he also forwarded to DW2, together with AB33. DW2 took no further action on AB34-35 as by then he had already informed PW1 that the agreement was already cancelled.

After 5 June 1987, further contacts were arranged between PW1 and DW2 with a view to ironing out the objections to the proposed agreement but when nothing could be resolved, PW1 saw a firm of solicitors in Singapore, M/s Yap & Yap, who on 18 June 1987, wrote AB44, threatening legal proceedings against the defendant to have, inter alia, the memorandum specifically performed.

What happened next is the receipt of AB49, dated 1 July 1987, by DW2. From the tenor of AB49, it is very clear that both parties were attempting to renew their contractual obligations to each other based on AB15-16 and in the same letter too, PW1 asked for accord on three issues which were the cause of the breakdown in their negotiations to complete AB15-16. These three issues are:

(1) the reconditioning costs for the three machines at $147,000 for which PW1 sought details of the actual repair works done as he disputes the amount of costs claimed, as being excessive;
(2) payment of the purchase price for which PW1 suggests that it be made in Kuala Lumpur by banker's draft or irrevocable letter of credit upon the defendant issuing the necessary invoices and other relevant documents and delivery to be effected upon receipt of payment;
(3) the conditions of the machines purchased for which PW1 requests that they shall be fully re-assembled with all the necessary attachments including the booms at the lengths specified in the letter.

PW1 gave DW2 time until 8 July 1987 within which to compromise on the three issues, following which PW1 would proceed to commence legal action against the defendant.

DW2 responded by despatching AB53 dated 7 July 1987 to PW1. In AB53, DW2 undertook to supply details of the repair works done on the three machines in due course and at the same time informed PW1 that additional expenses in the sum of $119,148.66 had been incurred in the repair of four other machines. Although no demand for payment was made by DW2 in his letter, it is clear subsequently that the notification of these additional costs was to put PW1 on notice that the plaintiff should also pay for such additional repair costs.

As for the payment of the purchase price, DW2 was agreeable to the mode suggested by PW1 provided it is paid in Japanese yen in Singapore and delivery can be effected immediately after payment. In. this respect, DW2 stressed that payment must be made on or before 22 July 1987, failing which, the defendant will not be bound by the memorandum. DW2 also expressed his disagreement to the machines being re-assembled with the booms as specified by PW1.

PW1's response to AB53 is evidenced by his letter dated 8 July 1987, AB56, wherein:

(1) he queried DW2 on the additional repair costs of the four machines for which no prior request or approval was made or given by him;
(2) he explained that the request to re-assemble the machines was nothing more than easy identification of the machines and to ensure that he got exactly what he had purchased. Alternatively, PW1 suggested that DW2 give an assurance that the machines purchased and delivered were the very same ones inspected by him;
(3) he agreed to the payment suggested by DW2 provided that all disputed issues were resolved by 11 July 1987.

Between 8 July to 11 July 1987, in an effort to conclude the agreement, PW1 sent sample invoices and delivery notes to DW2 so that the ones to be sent by DW2 shall contain the exact terms of their agreement.

Then on 11 July 1987, DW2 sent AB63 objecting to PW1's denial of liability to meet payment on the additional repair costs of the four machines and sought clarification on the phrase 'other than the financial encumbrances on the machines ...' used by PW1 in AB57. A sample delivery order, AB64, and a sample invoice, AB65-66 were also sent together with AB57. In his oral testimony, DW2 also stated that PW1's request for an assurance as to the condition of the machines was both unreasonable and unnecessary, as they had already agreed that the machines were to be purchased on an 'as is where is' basis.

In his follow-up letter dated 13 July 1987, AB67, PW1 clarified the meaning of the phrase 'other than the financial encumbrances on the machines ...' and he also sought clarification on the mode and place of payment of the purchase price.

Then on 15 July 1987, DW2 sent the defendant's invoice, AB68-69, wherein payment is confirmed to be

by way of banker's draft on or before 22 July 1987. AB69, however, is silent as to the place of payment and neither was this stated in AB70, dated 16 July 1987, wherein DW2 clarified how payment of the purchase price was to be made. When cross-examined, DW2 testified that it mattered not where payment was made, be it in Singapore or Kuala Lumpur, as long as such payment was made by 22 July 1987.

Apart from AB67, there is no other documentary evidence to show what took place between the parties from 13 July 1987 to 17 July 1987.

However, PW1's oral testimony reveals that he had been trying from Singapore to contact DW2 by telephone to resolve the outstanding issues between them. When he failed to do so, he came to Kuala Lumpur on 16 July 1987 and met his solictors, M/s Shearn Delamore & Co. Unfortunately, Mr David Morais, the solicitor handling his matter, was not in his office but he was referred to another solicitor, Miss Gita Nair, PW2, who on PW1's instructions, rang and spoke to DW2 personally. The latter informed her that he would ring back in three or four days to fix an appointment for PW1 to see him. He never did so.

DW2's oral testimony regarding this telephone conversation is that he had spoken to a lady from M/s Shearn Delamore & Co who informed him that PW2 was going to call him on behalf of the plaintiff. He denied ever speaking to PW2 or promising to call back to fix an appointment with PW1.

The fact of that telephone call is confirmed at AB73, a letter dated 18 July 1987, written by the plaintiff's solicitors. In it, the plaintiff agreed to abide with the terms of the memorandum but since the date of payment, 22 July 1987, set by the defendant was too short a notice, requested that they revert to their previous arrangement that the plaintiff be given a week's notice to make payment and that it undertook to make payment on 27 July 1987. As this was a variation to the date of payment fixed by the defendant, the plaintiff ended the letter with the caution that if the plaintiff failed to hear anything from the defendant to the contrary, it will assume that the new date of payment is agreeable to the defendant.

AB73 was telefaxed to DW2 on 18 July 1987, a Saturday, but DW2 had sight of it the following Monday, 20 July 1987. In his reply at AB76, dated 21 July 1987, DW2 denied ever speaking to PW2 on 16 July 1987, and indicated in no uncertain terms that he was not agreeable to extending the date of payment to 27 July 1987.

The plaintiff's response at AB77 dated 22 July 1987 again reiterated that it is reasonable business practice to allow a grace period of seven to ten days within which to make payment of such a large sum as the purchase price in this transaction and the plaintiff again confirmed that it will make payment on 27 July 1987.

The reply from the defendant that arrived the next day in AB79 states that since the plaintiff had failed to pay the purchase price on 22 July 1987, the defendant has treated such non-payment as a wrongful repudiation of the memorandum, but nonetheless it accepts such a repudiation and will hold the plaintiff liable for damages.

The plaintiff refused to accept the repudiation and on 25 July 1987, its solicitors replied stating that the plaintiff will be in Kuala Lumpur at 12 noon on 27 July 1987 to make payment and that it is expected that there will be no shortfall in the attachments to the machines purchased and delivered.

Subsequently, the oral testimony shows that on 27 July 1987, PW1 came to his solicitor's office accompanied by five other persons and at 4 pm the same day, they proceeded to DW2's office, where they waited for about an hour before he arrived. PW1 then tendered the money to DW2 but the latter refused to accept it and after getting instructions from his own solicitors, PW1 left DW2's office without making payment.

Having set out the details of events, I now turn firstly to the principal issue raised in this suit, ie what is the date of completion. Is it the earlier date, 22 July 1987, set by the defendant or the later date, 27 July 1987, as fixed by the plaintiff?

From the memorandum, it is clear that time was not originally the essence of the agreement between the parties and that the only reference as to time concerns the formal sale and purchase agreement to be entered into between them and even that too, no specific time was mentioned other than that it should be at the soonest possible time. Under such circumstances, time can only be made the essence of an agreement by one party giving a notice to the other subject to two requirements: (1) that the other party has been guilty of unreasonable delay and (2) the time mentioned in the notice must be reasonable: *Ganam d/o Rajamany* v *Somoo s/o Sinniah*[1] is authority for this proposition of law.

It is the defendant's contention that when it wrote AB53, dated 7 July 1987, fixing 22 July 1987 as the date of payment, it had every intention to make time the essence of the agreement as the plaintiff had been making unreasonable demands, thereby delaying the completion of the agreement. It is also submitted that the 14 days grace period between the date of the letter, 7 July 1987, to the date of completion, 22 July 1987, is a reasonable period of time within which the plaintiff can marshall its resources to raise the purchase price and convert it into 92.5 million yen.

It is not disputed that the 14 days notice to pay is a reasonable good notice but what is disputed is whether

the plaintiff had unreasonably delayed payment as to warrant the defendant making time the essence of the agreement. For this I consider that the conduct of the plaintiff prior to 22 July 1987 is most relevant to establish the defendant's allegation that PW1 had made unreasonable demands so as to stall payment as the plaintiff did not have the necessary funds to make payment.

I summarize the plaintiff's unreasonable conduct alluded to by the defendant as being the following.

(1) *PW1's insistence that if the plaintiff is to enter into the sale and purchase agreement with Fuji Sangyo, then the defendant should show evidence that Fuji Sangyo are the owners of the machines.*

The reasons given by the defendant why the sale and purchase agreement should be entered with Fuji Sangyo are (a) the defendant is only an agent of Fuji Sangyo, (b) being based in Singapore, payment of the purchase price would be made more convenient for the plaintiff who is also based in Singapore. The defendant also reasoned that as PW1 had agreed with DW1, to Fuji Sangyo's participation and had prepared AB19-21 on Fuji Sangyo's letterhead, there is no cause for PW1 to doubt the defendant's oral declaration that the machines belonged to Fuji Sangyo.

The plaintiff's objection to Fuji Sangyo's participation is clearly expressed by PW1 in para (A) of AB34 and from his evidence he clarified that what he actually wanted was just a written notification that the machines belonged to Fuji Sangyo.

Since the defendant has already admitted it is only an agent for Fuji Sangyo who are the registered owners of the machines, there is therefore nothing to prevent the defendant stating so in writing so as to satisfy the plaintiff who is about to part with a large sum of money, in exchange for machines, the actual ownership of which was being sought. I consider that this is one of the areas of mutual understanding that AB16 speaks about and I find nothing unreasonable about PW1's conduct in requesting for a written confirmation of Fuji Sango's ownership over the machines. Interestingly the subsequent sale and purchase of the same machines to a third party, pursuant to AB86, dated 31 July 1987, is not entered into by Fuji Sangyo but by the defendant itself.

(2) *PW1's refusal to make payment in Japan on 5 June 1987, resulting in AB29-31 being aborted.*

It is the defendant's contention that agreement on payment had been reached when DW2 met PW1 on 2 June 1987. PW1 had then agreed to make one lump sum payment, in cash, in Japanese yen, at the home of DW1 in Japan, on 5 June 1987. It was following such an arrangement that such terms of payment were prepared by DW2 personally at AB30. PW1's evidence of this meeting is that discussions were held between him and DW2 as regards payment and he was prepared to make payment at a hotel in Japan but not at the home of DW1.

In determining whether any arrangement regarding payment had been agreed upon on 2 June 1987, I am more inclined to accept PW1's version as being more probable. To begin with, his first reaction on receiving AB29-31, on the evening of 3 June 1987 was to call DW2 immediately and to state his unwillingness to travel to Japan on 4 June 1987, carrying 92.5 million yen in cash on his person and making payment the next day at the home of DW1. In AB30, DW2 clearly spelt out that payment was to be made in cash, which he highlighted by typing the word, 'cash' in capital letters. Despite DW1's testimony that payment by cash in the context of the Japanese way of conducting business includes also payment by cheque, the fact that DW2 has identified payment to be by cash and by no other means can only be concluded that he meant exactly what he had stated. There can be no question of any mistake in terminology as on his own admission, DW2 had drafted and typed AB29-31 personally.

With only one specific mode of payment expressed, I consider that it is not unreasonable for PW1 to object to making payment in cash as that is hardly the safe and expected manner in which large sums of money change hands in any form of legal transaction. Added to this is the fact that PW1 had barely two days to raise the purchase price and convert it into Japanese currency. PW1 and DW2 met on 2 June 1987 and they were supposed to proceed to Japan on 4 June 1987 so that payment could be made the next day. The time factor alone is sufficient reason for me to conclude that no concrete agreement was reached regarding payment and that the purpose of travelling to Japan may well be to negotiate further with DW1 as only DW1 had the final say in the matter. By refusing to travel to Japan and making payment in the manner demanded by the defendant, I do not consider that PW1 had acted unreasonably and the fact that no accord was reached on AB29-31 is as much the defendant's fault, if any.

(3) *The assurance asked for by the plaintiff that the machines purchased came in with the attachments as inspected by PW1.*

It is not disputed that the machines were to be purchased on an 'as is where is' basis, and for this reason, PW1 inspected the machines three times before AB15-16 was concluded and he also made a further inspection on 2 June 1987.

The term 'as is where is' appearing in a sale transaction is defined in the *Encyclopaedia of Practical Usages of*

Terminology for Business Agreements, at p 40, as being a sale of goods 'without warranty or guarantee as to quality, character, condition, size, weight or kind.' In other words, to quote PW1, 'I take them as I see them'.

It is PW1's evidence that before AB15-16 was concluded, he had inspected the machines at the defendant's yard. In respect of the nine crawler cranes listed in AB15, he found that they had booms on them. The booms are the long parts of the cranes which are used for lifting goods and every crawler crane must have a boom.

Together with his technician, PW3, PW1 had measured the booms and the minimum lengths were those measured before AB15-16 was signed and these are specified in AB59. Thus when he wrote AB57 seeking the assurance from the defendant that the machines he purchased should also come with all the components he had inspected or discount given for those found missing on delivery, all he wanted the defendant to do was to assure him that the crawler cranes would come with the same booms as he had seen and measured before he executed AB15-16. It was no more than that he should get what he had bargained for. Hence to deny that assurance would go against the spirit of AB15-16 and in this case, I consider that it is the defendant who had acted unreasonably in not affording the plaintiff the mutual understanding that had been spelt out in AB16. To that extent, I do not consider that the plaintiff was in any way unreasonable when it asked for the assurance from the defendant.

(4) *The issue over the costs of reconditioning the three machines and the additional four machines.*

It is not disputed that at AB16, there is agreement that the plaintiff shall pay the repair or reconditioned works done on machines for which such works had already commenced. Such works are necessary as the defendant's yard is by the sea and the machines have been left exposed in the open.

It is not disputed that three of such machines, listed as 3, 4 and 17 in AB15 were being repaired at the time AB15-16 was concluded. The liability to pay is admitted by the plaintiff but it disputes the quantum of $147,000 claimed as being excessive. In this respect, reliance was placed on the evidence of PW3 who testified that repair works that had been stated to have been effected on the three machines were in fact not done.

The defendant maintains that agreement on the amount had been reached between DW1, the repairer, DW3 and PW1, long before AB15-16 was executed.

It is DW1's evidence that originally, he had intended to use the three machines for his company and when reconditioning works became necessary, he negotiated with DW3 for such works and the latter agreed to reduce his quoted price of $240,000 to $147,000. Hence PW1 was never involved in this arrangement as he had not come into the picture at that point of time.

However, when he, PW1, decided to purchase the same three machines, he met DW3 twice to negotiate a reduction of the repair costs. PW1 was only prepared to pay $93,000 but DW3 did not accede to his requests and as far as DW3 was concerned, the matter ended there.

From this unchallenged evidence, I am more inclined to accept that there was no agreement reached on the quantum of repairs to be paid by the plaintiff. The $147,000 repair costs was what was agreed between DW1 and DW3 and the amount had already been settled by the defendant with DW3. If indeed there had been agreement on quantum between PW1 and DW1, that figure would surely have been stated in AB15-16, for after all the alleged agreement was reached before AB15-16 was concluded. I am further fortified in my conclusion in that PW1 did not also state the repair costs in AB20A, thus tending to support that no agreement on quantum had been reached.

However, in an effort to ascertain the true extent of the plaintiff's liability for such repair costs, PW1 had, at AB49, formally asked for the nature of the repair works done on the three machines. This it did subsequently at AB54 which also included the nature of the repairs done, but at AB53, the defendant had also disclosed for the first time that additional costs of $119,148.66 had been further incurred in the repair of four other machines, those listed as 1, 6, 15 and 26 in AB15 and for which a demand of payment was subsequently made by the defendant.

From the relevant quotations of repair works to be done on these four machines at AB40-43, AB36-39, AB45-47 and AB51-52, it is very clear that the repair works were requisitioned after AB15-16 was concluded as all the quotations are dated in June and July 1987. The plaintiff can only be held liable for such costs if PW1 had requisitioned and approved such repairs but since there is no evidence to that effect and under AB16, the plaintiff's liability for repair costs has been limited to the repair of three machines, the defendant is not entitled to hold the plaintiff liable to make payment of the additional costs of repairing four other machines.

It was against this background of four unresolved issues that the defendant had fixed 22 July 1987 as the date of payment but I consider that these issues can hardly be described as arising from the unreasonable demands made by the plaintiff, as DW2 himself is not without blame. Just because PW1 had objected to the quantum of the repair costs to the three machines, this does not give DW2 the right to bill the plaintiff for the additional costs of repairing four other machines which PW1 had not requested for and which goes beyond their

understanding reached in the memorandum. Since the essence of any agreement lies in the parties reaching accord on material terms in such agreement and since in this case there was no such common consensus reached between the parties when the defendant fixed 22 July 1987 as the completion date, it is my considered opinion that time did not become an essence of this agreement as at the time the date was fixed, there were still unresolved issues pending between the parties.

However, I view the situation quite differently on 18 July 1987 as by that time there is evidence to show that the plaintiff had decided to forgo their objections, particularly to the payment of the two sums claimed on the repair costs of seven machines. In an attempt to complete the whole transaction, PW1 had decided to act on the advice of his solicitors, ie pay the disputed repair costs as demanded under protest, make payment for the machines and sue the defendant later.

In this respect, the conduct of DW2, particularly the week preceding 22 July 1987 is most relevant to show that he had not been very accommodating. Attempts by PW1 to contact him from Singapore proved to be unsuccessful as he never responded to PW1's telephone messages. Thus on 16 July 1987, PW1 came to Kuala Lumpur specially to seek him but before doing so, PW1 sought the assistance of PW2 to arrange an appointment with him.

It is PW2's evidence that she had personally dialled DW2's number, spoke directly with him as they had identified themselves to each other and PW2 had then stated the nature of her call and tried to fix an appointment for PW1 to see him. DW2 responded by stating that he would ring back in three or four days time to fix the appointment, but he never did.

DW2 denies speaking to PW2 and his testimony is that he had spoken to a lady from Shearn Delamore & Co, who told him that a Miss Gita Nair would ring him on behalf of the plaintiff. She never did.

Although DW2 did not identify the lady he had spoken to, I assume that he must be referring to the telephone operator at M/s Shearn Delamore & Co.

I have seen DW2 in the witness box and I am not too convinced of his denial that he had not spoken to PW2 as there does not appear to be any logical reason why the telephone operator should leave him with a message that PW2 would call him. From the manner in which the call was put through personally by PW2, I am more than satisfied that DW2 had lied when he testified that he did not speak to PW2 and the conclusion that I can reach for him doing so is that he was waiting for an excuse to have the memorandum repudiated, and that occasion presented itself when he immediately wrote AB79 dated 23 July 1987, accepting repudiation of the memorandum from the plaintiff's non-payment on 22 July 1987.

Coming to 18 July 1987 when the plaintiff's solicitors wrote to say that the plaintiff was prepared to make payment on 27 July 1987, I consider that they were doing nothing more than to comply with their mutual understanding expressed in the memorandum that the agreement should be reached 'at the soonest possible time' which in the context of this case must be read to mean within a reasonable time after 18 July 1987 when all disputes had been resolved by the plaintiff deciding to compromise them.

On the facts and circumstances of this case, I find 27 July 1987 to be the more acceptable date of completion as at that date, whatever issues that were pending between the parties no longer existed then. To that end, when the plaintiff tendered payment of the purchase price to the defendant on 27 July 1987, and this was not accepted by DW1, the defendant had been in clear breach of the memorandum.

As for the defendant's defence that the plaintiff did not have the necessary funds to make payment of the purchase price on 22 July 1987, as the plaintiff had depended on its buyers for its source of payment, following contracts of resale entered into with them, I do not consider that this defence merits any consideration whatsoever. The defendant is not entitled to question where the plaintiff can turn to, to make payment. All that is relevant is whether at the time payment was due, the plaintiff can produce the money and since I have ruled that the date for such payment was 27 July 1987, there is evidence that the plaintiff was able to make payment on that date.

Admittedly PW1 had come to DW2's office on 27 July 1987, accompanied by five of the plaintiff's buyers but he had in his possession 98 million yen, 24 million yen and 4 million yen of which two in were banker's drafts, AB83 and AB81, 70 million yen and $280,000 in cash, sufficient to pay off the purchase price. It matters not that part of the purchase price came from the buyers.

Having ruled that it is the defendant that had breached the memorandum, can the plaintiff also succeed on its plea to have the memorandum specifically enforced?

The subject matter of the memorandum is one lot of mixed second-hand heavy machinery and clearly it is a contract for the sale of goods. Under s 58 of the Sale of Goods (Malay States) Ordinance 1957, in any suit for a breach of contract to deliver specific or ascertained goods, the court has the discretion, if it considers fit, to decree specific performance of the contract without giving the defendant the option of retaining the goods on

payment of damages, subject to the provisions of Chapter II of the Specific Relief Act 1950.

'Specific goods' have been defined by s 2 of the Ordinance to mean goods identified and agreed upon at the time the contract of sale is made. The contract of sale in this case is the memorandum and at AB15, the machines have been identified by description, model number and serial number. As such, there is no doubt that the goods are specific or ascertained.

Our s 58 is in pari materia with s 52 of the English Sale of Goods Act 1979 except for the exclusion of a reference to statutory provisions similar to Chapter II of our Specific Relief Act 1950. In deciding whether or not to make an order of specific performance, in addition to determining the type of goods in question, the court is entitled to look to all the surrounding circumstances of the case including the conduct of both the buyer and the seller and to consider the hardship which an order would inflict on the seller.

In *Behnke* v *Bede Shipping Co Ltd*,[2] a ship was held to be a specific chattel in respect of which an order for specific performance could be made. The judge in that case took account of the fact that the ship in question was of peculiar and practically unique value to the buyer, that the buyer wanted the ship for immediate use and damages would not be an adequate remedy.

PW1 testified that he had been in the business of buying and selling heavy equipment machines for the past ten years. In May 1987 he had asked his brokers in Malaysia to locate such machines, and they directed him to the defendant. He inspected the machines and when he had decided to purchase them, caused an advertisement, AB94, to appear in the Singapore *Straits Times*, offering the same machines for sale. Some buyers had answered his advertisement as evidenced by the invoices at AB24, 26, 27, 72 and 75, even before the plaintiff had come into possession of the machines. It has now been pleaded that the loss of trading relations with these buyers in the event of non-delivery on its part entitles it to have the memorandum specifically performed.

I do not consider that the plaintiff's obligations to third parties can form the basis of a decree of specific performance especially so in this case when such obligations were incurred before the subject matter of such sales had come into the plaintiff's possession.

If anything at all the plaintiff must show that the machines are not easily available in the market and as such they are of a unique interest and value to it. In this respect, PW1 testified that it was possible to buy similar machines in the market in large quantitites. This evidence is further enforced by DW1 stating that bulk sales of such machines is possible in the market after a large project has been completed or if one is prepared to look from place to place. Since such goods can be located in the market, either singly or in bulk, I do not consider that the test of their unique value has been discharged by the plaintiff and on this ground alone I consider that damages is an equally adequate remedy for the defendant's breach.

Consequent upon my finding that the defendant had breached AB15-16, I now make the following orders in favour of the plaintiff:

(1) general damages for breach of the memorandum and that the amount when assessed is to be contraed against the repair cost of the three machines also to be assessed;
(2) damages to be assessed on the loss of agency rights over the machines listed at AB17-18;
(3) the defendant's counterclaim in so far as it does not relate to the plaintiff's liability for repair costs of the three machines is dismissed;
(4) defendant to pay the costs of the whole action.

Order accordingly.

Solicitors: *Shearn Delamore & Co*; *Shook Lin & Bok*.

Reported by *PS Ranjan*

Bertam Consolidated Rubber Co Ltd v Pemungut Hasil Tanah, Seberang Perai Utara, Butterworth

HIGH COURT (PENANG) – LAND REFERENCE NO 15-9-82
EDGAR JOSEPH JR J
31 DECEMBER 1988

Land Law – Compulsory acquisition of land – Compensation award by Collector of Land Revenue – Reference to court – Fair market value – Principles of determining compensation – Whether fair market value subject to constraint imposed by s 214A of National Land Code 1965 – Res judicata – Claim for severance and injurious affection – Loss of crops – Cost of new drains and fencing – Cost of alternative road – Insurance – Recoupment of fees paid by objectors – Interest rate applicable – Land Acquisition Act 1960, s 36(1)

This was a reference to court of an award made by the Collector of Land Revenue, Butterworth under s 36(1) of the Land Acquisition Act 1960 ('the Act') in respect of the compulsory acquisition by the government of the State of Penang of 32.2841 acres of land, being part of oil palm estate land, known as Bertam Estate, the total area of which is approximately 5,000 acres, the property of the objectors. The date of the publication of the declaration under s 8 of the Act that the land concerned was to be compulsorily acquired for purposes of a public road was 13 September 1979 and it is that date which is material for purposes of determining its fair market value. At the inquiry before the Collector held at the Butterworth Land Office on 22 October 1980, the objectors made a claim based upon a valuation made by Williams, Talhar & Wong, chartered valuers, for